No. 82-1876

IN THE

Supreme Court of the United States

October Term, 1983

FOREMOST PRO COLOR, INC.,

Petitioner,

vs.

EASTMAN KODAK COMPANY,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals render a decision in conflict with the decision of another federal circuit court of appeals in determining whether petitioner's averments that respondent introduced technologically interrelated products, absent any alleged coercive associated conduct, stated a claim for relief either for a *per se* illegal tying arrangement under Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, or for attempted monopolization or monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2?

2. Did the Ninth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings in determining whether petitioner's averments that respondent (1) failed to make timely deliveries and (2) failed to provide technical services with respect to equipment purchased *but not resold* stated a claim for price discrimination in connection with a "commodity bought for resale" under Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(e)?

3. Did the Ninth Circuit Court of Appeals depart from the accepted and usual course of judicial proceedings in determining whether petitioner's averments that it was not "offered" the same payment terms as "offered" to its competitors, absent any averment that the alleged price discrimination "may substantially lessen competition," stated a claim for relief under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a)?

The following information is provided pursuant to this Court's Rule 28.1. Only respondent Eastman Kodak Company has a direct interest in the outcome of this case. All subsidiaries are wholly-owned; neither the stock nor debt of any is publicly traded.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 703 F.2d 534, and is set forth in Appendix A to Petition ("App. A").

COUNTERSTATEMENT OF THE CASE*

Petitioner Foremost Pro Color, Inc. ("Foremost") is an authorized Kodak dealer and an independent photo-finisher engaged in developing and printing photographic

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* Petitioner's "Statement of the Case" is replete with information not contained in the record, which explains why it is devoid of citations either to that record or to the opinion below. It makes no attempt to apprise the Court of the proceedings to date, and in fact bears little relationship to the case. For these reasons, it cannot be relied upon in determining whether to grant the writ.

negatives. As a dealer, Foremost has purchased Kodak film, paper and chemicals for retail marketing. As a photofinisher, Foremost has purchased photofinishing equipment, paper and chemicals from Kodak for use in rendering photofinishing services to its customers. 703 F.2d at 537; App. A at 2.

Foremost's Petition is the coda to its many diffuse attempts to enlarge simple state law contract claims into "major" antitrust litigation. Foremost filed this action in 1976 with the manifest hope of trailing in the wake of the case which ultimately resulted in the decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) ("*Berkey*"). Similar to *Berkey*, this litigation arises out of Kodak's introduction in 1972 of its then newest line of cameras, the 110 "pocket instamatic," and related technologically compatible products. *See id.* at 276-78. In relevant part, *Berkey* held that Kodak did not monopolize or attempt to monopolize any relevant market by failing to predisclose to its competitors the new 110 technology or by "system selling" the 110 camera and new film. *Id.* at 279-88. Foremost's various assertions that the opinion in this case conflicts with *Berkey*, obviously made in the hope of attracting the Court's attention, are flatly wrong.

This case arrives at the Court's doorstep following four unsuccessful attempts by Foremost to draft a complaint setting forth *prima facie* claims for antitrust violations. The original complaint averred five contract and three antitrust claims. Foremost voluntarily dismissed one antitrust claim, and the district court dismissed the remaining two for failure to state claims for relief. 703 F.2d at 539 n.1; App. A at 7 n.1.

The first amended complaint restated the five contract claims and the two previously dismissed antitrust claims, and added three new antitrust claims. The district court

dismissed all of the antitrust claims for failure to state claims for relief, and accordingly did not rule on an alternative motion for summary judgment on those claims. The second amended complaint repeated the five contract claims and appended six antitrust claims. Once again the district court dismissed the antitrust claims and thus did not rule on Kodak's alternative summary judgment motion. *Id.*

Foremost then filed a third amended complaint ("complaint") containing the contract claims (Claims 1-5), and this time, four antitrust claims (Claims 6-9). *See* Appendix E to Petition ("App. E"). The seventh and eighth claims for relief averred that Kodak's introduction of the 110 technologically related system of products constituted a tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14, and an attempt to monopolize and monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. The sixth and ninth claims averred that Kodak violated the price discrimination prohibitions of Sections 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a) and (e), by failing to make timely deliveries on equipment orders, by failing to provide technical services and by failing to offer certain payment terms purportedly enjoyed by Foremost's competitors.

The district court determined that the sixth, seventh and eighth claims were identical to those dismissed previously and hence dismissed them without leave to amend. Kodak's alternative summary judgment motion was thereby mooted. The remaining ninth claim, pleaded for the first time, was dismissed with leave to amend but Foremost declined to do so. After Kodak won summary judgment on four of the five remaining contract claims, Foremost voluntarily dismissed its final contract claim and prompted the trial court to enter judgment in Kodak's favor. *Id.*; Appendix B to Petition 1-6.

The Ninth Circuit Court of Appeals unanimously affirmed both dismissal of the antitrust claims and summary judgment on the contract claims. Although the petition does not challenge the affirmance of summary judgment on the contract claims, that affirmance is notable insofar as the charging factual averments of the contract claims were identical to those supporting the sixth claim for relief. See App. E at 11. The Court of Appeals' opinion conflicts with none of this Court's opinions nor with any other federal court opinion, specifically including *Berkey,* and reflects no departure whatsoever from the accepted and usual course of judicial proceedings. *See* Sup. Ct. R. 17.1.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH *BERKEY.*

The Court of Appeals' determination that Foremost's complaint did not state a claim under the Sherman Act in no way conflicts with *Berkey.* First, as to Foremost's Section 1 tying claim, no such claim was decided in *Berkey. Berkey, supra,* 602 F.2d at 299-305. Second, as to Foremost's Section 2 attempt to monopolize and monopolization claim, *Berkey* in fact vindicated Kodak's introduction of the 110 system of products. *Id.* at 279-292. *Berkey* did not, as Foremost states (Petition at 10-13), hold that Kodak violated Section 2 by using monopoly power in film to control markets in papers, chemicals or photofinishing equipment. *Id.* In any event, Foremost's complaint did not distinguish among the markets comprising the alleged "amateur photographic market," and thus raised no issue whether Kodak attempted to leverage monopoly power in film in order to control any other market. App. E at 17-19; 703 F.2d at 544; App. A at 15. *Compare Berkey, supra,* 603 F.2d at 268-71; *GAF Corp. v. Eastman Kodak Co.,* 519 F. Supp. 1203, 1209 (S.D.N.Y.

1981) (*"GAF"*). The Court of Appeals, which in fact relied heavily on the *Berkey* opinion, correctly decided that Foremost had not stated a Sherman Act claim.*

A. The Uncoerced Sale Of Technologically Compatible New Products Does Not Constitute A *Per Se* Illegal Tying Arrangement, And Foremost Thus Did Not State A Claim Under Section 1 Of The Sherman Act.

Foremost's seventh claim attempted to plead a tying arrangement in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 3 of the Clayton Act, 15 U.S.C. § 14. App. E at 13-16. Foremost asserted that it was "required" to purchase Kodak's new compatible film whenever it purchased Kodak's new 110 cameras (*id.* at 14), and that it was "required" to purchase new compatible chemical products whenever it purchased the new film and compatible paper products (*id.* at 14-16). Foremost was allegedly "required" to purchase the 110 components as a package because the new film could not be processed with existing technology, and hence the new supporting products were necessary to meet consumer demand for 110 cameras and the processing of 110 film photofinishing orders. *Id.*; 703 F.2d at 534-35, 541; App. A at 6-7, 10.

The Court of Appeals held that Foremost did not aver the requisite "coercion" and hence did not state a claim for a *per se* Section 1 violation. 703 F.2d at 542-43; App. A at 12. The opinion follows well-established law and plows no new ground justifying granting of the writ. The decision hardly conflicts with *Berkey* given that no tying claim was decided in that case.

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* Foremost's suggestion (Petition at 10) that the Court of Appeals did not construe the complaint so "as to do substantial justice" as required by Rule 8(f) of the Federal Rules of Civil Procedure is thoroughly belied by even a casual reading of the opinion. The Court of Appeals gave full weight to the complaint's averments, as Foremost itself interpreted them in its written and oral arguments.

This Court has held that coercion by the seller is an important element of a *per se* illegal tying claim. *See, e.g., Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5-6, 10 (1958). As the Court noted in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953),

> "[t]he common case of the adjudicated unlawful tying arrangement is the *forced* purchase of a second distinct commodity with the desired purchase of the dominant 'tying' product . . . ." (Emphasis added.)

See also Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980); *Ogden Food Service Corp. v. Mitchell*, 614 F.2d 1001, 1002-03 (5th Cir. 1980); *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1218-19 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976).

Foremost pointedly refrained from averring that Kodak *"forced* the purchase of a second distinct commodity with the desired purchase of . . . [a] dominant 'tying' product." There was no averment that Kodak conditioned the sale of any product on the purchase of another. Nor did Foremost allege that Kodak's dominant purpose in designing and introducing the 110 system was to compel purchase of the entire system as a package, as opposed to achieving the legitimate goal of introducing technologically advanced products developed to satisfy consumer demand for pocket-size cameras. While Foremost averred that the purchase of the tied products was "required," that word alone is not sufficient to support even an inference of the necessary coercion. 703 F.2d at 541; App. A at 10. *See, e.g., Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708-09 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978). Moreover, Foremost itself interpreted its claim to mean simply that whenever it "purchased one Kodak product, it necessarily had to purchase additional Kodak commodities." Petition at 12; 703 F.2d at 540; App. A at 7. Thus,

the Court of Appeals correctly stated that "Foremost's tying claim alleged only the introduction of technologically related components incompatible with existing products offered by the competition." 703 F.2d at 543; App. A at 12. Foremost therefore plainly failed to aver the coercion essential to a *per sc* unlawful tying arrangement.

Lacking any averment that Kodak "coerced" or "forced" the purchase of any tied product, Foremost's claim basically involved a so-called technological tie. The Second Circuit rejected an analogous Section 2 monopolization claim of "system selling" in *Berkey, supra,* 603 F.2d at 285-88. *See also Response of Carolina, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1326-31 (5th Cir. 1976) (rejecting the technological tie theory in the context of computer products). As the Court of Appeals noted in this case, placing technologically compatible product offerings in the *per se* illegal category would run directly contrary to the purpose of the antitrust laws:

> "Indeed, such a rule could become a roadblock to the competition vital for an ever expanding and improving economy. Product innovation, particularly in such technologically advancing industries as the photographic industry, is in many cases the essence of competitive conduct. Therefore, we decline to place such technological ties in the category of economic restrictions deemed *per se* unlawful by *Northern Pacific* and its progeny."

703 F.2d at 542; App. A at 11. *See Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49-51 & 50 n.16 (1977).

The precise holding of the Court of Appeals is "that the development and introduction of a system of technologically interrelated products is not sufficient alone to establish a *per se* unlawful tying arrangement even if the new products are incompatible with the products

then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others." 703 F.2d at 542-43; App. A at 12. The holding is perfectly consistent with the line of cases originating with *Northern Pacific*, and notably Foremost does not argue to the contrary. Petition at 12.

Foremost complains only that the Court of Appeals failed to apply a rule of reason analysis in assessing the viability of its tying claim. Petition at 12. Foremost, however, never raised this issue on appeal. *See* Appellant's Opening Brief at 11-23; Appellant's Reply Brief at 4-10. As the Court of Appeals noted, "Foremost has not challenged the alleged tying arrangement under the rule of reason. Thus, the dispositive question before us is whether, under the *per se* rule, Foremost adequately pleaded the requisite coercion in its Complaint." 703 F.2d at 541; App. A at 9.

B. Foremost's Averments That Kodak Delayed Introduction Of New Technology Products Did Not State A Claim For Monopolization Or Attempted Monopolization.

In its eighth claim, which incorporated the tying claim discussed above, Foremost attempted to plead that Kodak had monopolized and attempted to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. App. E at 17-19; 703 F.2d at 543-46; App. A at 12-17. Kodak allegedly dominated the "amateur photographic market" as a result of its "continually researching and developing new photographic products," "refrain[ing] from introducing them until its market position is endangered," and "render[ing] obsolete existing competitive products." App. E at 17-18. *See* 703 F.2d at 543; App. A at 12. The specific predatory acts averred included developing the new 110 products which were incompatible with then existing products and equipment, withholding those prod-

ucts until competition forced their market introduction, and developing and marketing the 110 system in such a manner so as to require Foremost to purchase new paper, chemistry and equipment in order to photofinish Kodak's new film. *Id.* As such, the eighth claim launched a broadside attack on the very process of innovation and competition which the antitrust laws were designed to protect and foster. *See United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam). The Second Circuit affirmed the legality of Kodak's introduction and marketing of the 110 system in *Berkey, supra*, 603 F.2d at 278-86. *See also GAF, supra*, 519 F. Supp. at 1225-29.

Foremost's Petition characterizes the issue as "whether the Ninth Circuit correctly held that Kodak's use of its monopoly power in one area of the marketplace to control a secondary market is not a violation of the antitrust laws, while the identical issue was held to be a violation by the Second Circuit in *Berkey* . . ." Petition at 10. That assertion thoroughly mischaracterizes Foremost's complaint, the holding of the Second Circuit in *Berkey* and the holding of the Court of Appeals in this case.

In contrast to *Berkey*, Foremost did not attempt to state a claim on the ground that Kodak failed to "predisclose" its 110 system format to its competitors in willful maintenance of monopoly power or as anticompetitive conduct in furtherance of an attempt to monopolize. *See Berkey*, supra, 603 F.2d at 279-285 (holding that Kodak had no disclosure duty); *GAF, supra*, 519 F. Supp. at 1228-29 (same). More importantly, Foremost's complaint did not distinguish among the variety of product markets comprising the "amateur photographic market." *See Berkey, supra*, 603 F.2d at 268-71; *GAF, supra*, 719 F. Supp. at 1209. Thus, as the Court of Appeals specifically noted, there was simply "no occasion to address whether Foremost's complaint stated a valid

claim for relief on the ground that Kodak abused its monopoly power in the film market or used that power as a lever to create, or attempt to create, a monopoly in the markets for amateur still cameras or photographic chemicals or papers." 703 F.2d at 544; App. A at 15. *See Berkey, supra,* 603 F.2d at 268-71, 275-92.

The Court of Appeals affirmed dismissal of Foremost's eighth claim because it failed to aver facts that would *prima facie* establish the conduct element of a Section 2 offense, namely, the willful acquisition or maintenance of monopoly power in a relevant market. *See United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966); *Berkey, supra,* 603 F.2d 274-75. Four of the six acts that allegedly constituted an attempt to monopolize and monopolization of the "amateur photographic market" were simply repeats of the tying averments set forth in the seventh claim for relief. 703 F.2d at 544; App. A at 14. Because the introduction of technologically related products is, absent associated coercive conduct, neither predatory nor anticompetitive, Foremost's tying allegations obviously were "insufficient to aver the requisite willful acquisition or maintenance element of a monopolization claim or the anticompetitive or predatory conduct element of an attempted monopolization claim." *Id. See Berkey, supra,* 603 F.2d at 275-76, 285-88.

The remaining two anticompetitive acts Foremost asserted were (1) that the new 110 products were not compatible with existing non-Kodak photographic products, and (2) that Kodak did not announce and market the 110 system "until competition from other manufacturers force[d] the introduction" of the system. App. E at 18. The Court of Appeals held that neither of these averments was sufficient to satisfy the conduct element of Section 2. 703 F.2d at 544; App. A at 15.

In so holding, the Court of Appeals' opinion accords with *Berkey,* and indeed relies heavily upon the Second

Circuit's opinion. *Berkey* held that as a general rule "any firm, even a monopolist, may . . . bring its products to market whenever and however it chooses." *Berkey, supra,* 603 F.2d at 286 (footnote omitted). The Court of Appeals agreed with the holding in *Berkey* that, absent associated predatory conduct, Kodak's purported delay in marketing the 110 system could not support a Section 2 offense:

> ". . . [E]ven a monopolist cannot *exclude* or *restrain* competition in its own market or related markets by delaying the introduction of new, technologically advanced products. In this case, for example, any delay by Kodak in introducing the 110 system could have worked only to the advantage of photofinishers and competing manufacturers. Prior to the introduction of the 110 system, it is obvious that Foremost, along with all other photofinishers, was able to choose among several technologically compatible products offered by Kodak and many of its smaller competitors."

703 F.2d at 545; App. A at 17 (emphasis in original).

The opinion cautions, however, that product introduction is not immune from scrutiny under the antitrust laws. Specifically following *Berkey,* the opinion states that " 'it is not the product introduction itself, but some associated conduct, that supplies the violation.' " 703 F.2d at 545; App. A at 16-17, *quoting, Berkey, supra,* 603 F.2d at 286 n.30. *See also Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76, 93 (2d Cir. 1981) ("*Northeastern Telephone*"). Foremost never averred any "associated conduct," except the mere fact of technological incompatibilities between the 110 products and existing non-Kodak products.

The alleged technological incompatibility between Kodak's 110 system and competitive products cannot,

however, support a claim for technological predation under Section 2. Even assuming Kodak possessed the monopoly power averred, it "had the right to redesign its products to make them more attractive to buyers — whether by reason of lower manufacturing cost and price or improved performance." *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 744 (9th Cir. 1979). Nor did the antitrust laws impose any duty on Kodak to circumscribe its "product development so as to facilitate sales of rival products." *Id. See also Northeastern Telephone, supra,* 651 F.2d at 93; *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F. Supp. 423, 439 (N.D. Cal. 1978), *aff'd sub nom., Memorex Corp. v. International Business Machines Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied,* 452 U.S. 972 (1981); *Sargent-Welch Scientific Co. v. Ventron Corp., supra,* 567 F.2d 701 at 712. Thus, the case presents no novel or unsettled Section 2 issue requiring the attention of the Court.

II. THE ROBINSON-PATMAN ACT CLAIMS WERE CORRECTLY DISMISSED.

Foremost does not (and cannot) urge that the dismissal of the Robinson-Patman Act claims conflicts with any decision by this Court or by any other federal court of appeals. As discussed below, Foremost's claims were patently defective, and hence correctly dismissed.

A. Foremost Failed To State A Claim For Discrimination In Connection With Commodities "Bought For Resale."

Foremost's sixth claim for relief asserted that Kodak violated Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(e). App. E at 11-13. Section 2(e) prohibits indirect price discrimination against "purchasers of a commodity bought for re-

sale" by furnishing "services or facilities" that are not provided to "all purchasers in proportionately equal terms." 15 U.S.C. § 13(e). Foremost averred that Kodak violated Section 2(e) by (1) failing to deliver on photofinishing equipment orders within the same 60-day schedule maintained for Foremost's competitors, and (2) by failing to provide free technical assistance and services, relating to the conversion of Kodak photofinishing equipment and the handling characteristics of Kodak products, which were provided to Foremost's competitors. App. E at 11-12.

The prohibitions of Section 2(e) apply only to services or facilities connected with the *resale* of the commodity bought by the purchaser. *E.g., Corn Products Refining Co. v. FTC,* 324 U.S. 726, 744 (1945); *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.,* 594 F.2d 1313, 1318 (9th Cir. 1979); *Kirby v. P. R. Mallory & Co.,* Inc., 489 F.2d 904, 910 (7th Cir. 1973), *cert. denied,* 417 U.S. 911 (1974). Foremost did not aver that it resold the photofinishing equipment whose delivery was purportedly delayed. Nor did Foremost aver that it resold the photofinishing equipment as to which Kodak supposedly provided technical assistance only to its other customers. 703 F.2d at 546; App. A at 19; App. E at 11-12. Accordingly, the Court of Appeals correctly determined that "Foremost's failure to allege resale of the photofinishing equipment, the commodities with respect to which the alleged discrimination in deliveries and technical services occurred, is a failure as a matter of law to allege a crucial element of a Section 2(e) violation." 703 F.2d at 546; App. A at 19. In its Petition, as was true in the courts below, "Foremost never comes to grips with this fatal flaw." 703 F.2d at 547; App. A at 19.

B. Foremost Failed To State A Claim For Price Discrimination Because It Averred Neither That The Alleged Discrimination May Substantially Lessen Competition Nor Two Completed Sales To Different Purchasers.

Plaintiff's ninth and final claim attempted to aver price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). App. E at 19-21; 703 F.2d at 547; App. A at 20-22. The charging averments were that Kodak discriminated against Foremost by not "offering" a twelve percent price reduction and deferred payment terms that were offered to Foremost's competitors. The Court of Appeals affirmed dismissal because Foremost averred no facts from which any potential injury to competition could be inferred. 703 F.2d at 547-48; App. A at 21-22.

Section 2(a) specifically provides that price discrimination is unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ." 15 U.S.C. § 13(a). Thus, the language of the statute itself "compels the conclusion that a prima facie claim for unlawful price discrimination cannot be stated absent an allegation that the discrimination in price may produce injury to competition." 703 F.2d at 548; App. A at 21. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 51 U.S.L.W. 4275, 4276 (U.S. March 22, 1983); *Corn Products Refining Co. v. FTC, supra,* 324 U.S. at 738. Because Foremost did not aver that the alleged price discrimination may substantially injure or lessen competition, the Court of Appeals properly concluded that the claim was fatally deficient. "Injury to a competitor is not the test; the test is injury to competition." *Lloyd A. Fry Roofing Co. v. FTC,* 371

F.2d 277, 281 (7th Cir. 1966). *See also M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1067-68 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976). *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

The ninth claim was defective on an additional ground noted but not relied upon by the Court of Appeals. 703 F.2d at 547; App. A at 20. This Court has determined that a Section 2(a) claim requires at least two completed, contemporaneous sales by the same seller to different purchasers. *Bruce's Juices, Inc. v. American Can. Co.*, 330 U.S. 743, 755 (1947). The language of Section 2(a) requires the so-called "two purchaser rule" because it refers to discrimination "in price between different *purchasers*." 15 U.S.C. § 13(a) (emphasis added). *See, e.g., Carroll v. Protection Maritime Insurance Co.*, 512 F.2d 4, 9 (1st Cir. 1975); *M.C. Manufacturing Co. v. Texas Foundries, Inc., supra*, 517 F.2d at 1065; *Parrish v. Cox*, 586 F.2d 9, 12 n.8 (6th Cir. 1978); *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 688, 677 (9th Cir. 1975).

Foremost failed to plead this basic requirement for a Section 2(a) discrimination claim. It averred only that Kodak made "offers" to sell goods on allegedly disparate terms. The averments that Kodak made only "offers" to sell on different terms does not satisfy the requirement of two completed sales. *E.g., Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3rd Cir. 1939); *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 113-14 (S.D.N.Y. 1981).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

DATED: June 16, 1983

Respectfully submitted,

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